FILED

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No.

In The

Supreme Court of the United States

OCTOBER TERM, 1995

DAVID FRIEDLINE,

Petitioner,

v.

NEW HAMPSHIRE DEPARTMENT OF HEALTH & HUMAN SERVICES, OFFICE OF CHILD SUPPORT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW HAMPSHIRE SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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May 10, 1996

QUESTION PRESENTED

May an indigent defendant, in a civil contempt action for non-payment of child support in which the defendant will be summarily incarcerated if he does not pay, be denied court-appointed legal counsel?

PARTIES TO THE PROCEEDING

David Friedline was the defendant below. Patricia Shiel-Friedline's interest in child support payments was represented by the New Hampshire Department of Health and Human Services, Office of Child Support, which is the party appearing in the caption.

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PETITION FOR WRIT OF CERTIORARI TO THE NEW HAMPSHIRE SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

David Friedline respectfully petitions for a writ of certiorari to review the judgment of the New Hampshire Supreme Court in this case.

REPORT OF OPINIONS

The New Hampshire Supreme Court disposed of this case without opinion and New Hampshire trial court opinions are not reported. Thus, there is no official or unofficial report of this case. The order of the New Hampshire Supreme Court is contained in the appendix at 1. The order of the Merrimack County Superior Court is contained in the appendix at 2.

JURISDICTION

On October 6, 1994, the Merrimack County Superior Court found David Friedline in contempt for failure to pay child support. On February 12, 1996 the New Hampshire Supreme Court issued a summary affirmance, without opinion, of the lower court decision.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) (1988).

CONSTITUTIONAL PROVISIONS

The United States Constitution, Amendment XIV, Section 1, provides, in part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

David Friedline and Patricia Shiel-Friedline were divorced. At the time this case arose, Mr. Friedline was a child support obligor for his two minor children, and had a support obligation of $64 per week.

Upon a filing of a support violation and motion for contempt by the New Hampshire Office of Child Support, a hearing was held on October 6, 1994. *Notice of Hearing*, Appendix at 4.

Prior to the hearing, Mr. Friedline filed a "Request to Appoint Legal Council" [sic], in which he alleged that his physical liberty was in jeopardy, that he was unable to adequately represent himself, and that he did not have the

means to hire an attorney. In his motion, he cited *Lassiter v. Department of Social Services.*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640, *reh'g denied*, 453 U.S. 927, 102 S. Ct. 889, 69 L. Ed. 2d 1023 (1981), thus preserving the federal issue. *Request to Appoint Legal Council*, Appendix at 3.

During his hearing, Mr. Friedline renewed his request for counsel.

> "MR. FRIEDLINE: Your Honor, first I would like to make a note that I made a request with the clerk that I be provided legal counsel in this case.
>
> THE COURT: All right. Well that's denied. Okay. Go ahead.
>
> MR. FRIEDLINE: But I made a point of quoting a ruling of the US Supreme Court in *Lassiter v. State of North Carolina*, which the Supreme Court of the United States said that at any hearing in which you're [sic] physical liberty is in jeopardy, that the Court must appoint legal counsel if the defendant cannot afford it and I made that request. . . .
>
> THE COURT: Well, you're not entitled to counsel. This is a marital case and your request is denied. Go ahead.
>
> MR. FRIEDLINE: May I give you a copy of the Supreme Court ruling?
>
> THE COURT: Sure
>
> MR. FRIEDLINE: Thank you."

Transcript, at 6-7.

The Merrimack County Superior Court then ordered:

> "After hearing, the Court finds the defendant in contempt for failing to timely make child support payments. Current arrearage is $261.00 Defendant is to pay this amount in full . . . by 1:00 p.m. on October 7, 1994 or a capias shall issue for his arrest. . . ."

Order, Appendix at 2.

New Hampshire law provides that upon issuance of a capias, incarceration takes place upon arrest, without prior procedure. N.H. Rev. Stat. Ann. § 594:20-a (1995). Mr. Friedline borrowed the money necessary to pay the arrearage and thus avoided the capias.

Mr. Friedline thereafter filed a motion to reconsider, in which he alleged that "[t]he defendant's request for appointed legal council [sic] was denied by the court, in direct contradiction with a U.S. Supreme Court ruling" and again cited and quoted *Lassiter*. The motion was denied.

Still acting *pro se*, Mr. Friedline appealed his case to the New Hampshire Supreme Court. In his Notice of Appeal, Mr. Friedline posed the question for review:

> "Does an indigent defendant, in a civil contempt action for non-payment of child support in which the defendant may be incarcerated, be denied the opportunity of court appoint legal council [sic] to represent him at the hearing which may result in his incarceration?"

Notice of Appeal, at 3. In his Notice of Appeal, Mr. Friedline noted that his appeal involved

> "[t]he interpretation of the Due Process Clause of the Fourteenth Amendment, as regards the appointment of

> legal council [sic] in civil cases in which an indigent litigant may be incarcerated, as held by the US Supreme Court in Lassiter v. Department of Social Services of North Carolina (452 US 18) and as applied by the various circuits of the US Court of Appeals, and other state supreme courts in cases specifically dealing with nonpayment of child support."

Notice of Appeal, at 4.

Mr. Friedline provided to the New Hampshire Supreme Court a copy of *Lassiter*, as well as a copy of *Walker v. McLain*, 768 F.2d 1181 (10th Cir. 1985), which rules directly on the issue Mr. Friedline is herein raising. He also cited several other federal and non-New Hampshire state cases also directly ruling on the issue.

In his brief and argument, conducted by a volunteer attorney, Mr. Friedline asked the New Hampshire Supreme Court to overturn a previous decision of the New Hampshire court which is squarely on point and in which the Court found no fourteenth amendment right to an attorney in a child-support contempt hearing. *Duval v. Duval*, 114 N.H. 422, 322 A.2d 1 (1974); *see also Sheedy v. Merrimack County Super. Ct.*, 128 N.H. 51, 509 A.2d 144 (1986) (calling *Lassiter* presumption dicta and refusing to overrule *Duval*).

The New Hampshire Supreme Court, without opinion, affirmed the lower court.

At no time during the lower court proceeding, nor in his notice of appeal to the state supreme court, did Mr. Friedline enunciate a state ground for his demand for appointed counsel. Accordingly, state grounds were not preserved, *State v. Dellorfano*, 128 N.H. 628, 517 A.2d 1163 (1986), and thus there were no adequate independent state grounds for the New Hampshire Supreme Court's decision.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Conflicts with Decisions of this Court

The United States Supreme Court recognized in 1963 that the sixth amendment to the United States constitution requires appointment of counsel to indigent defendants in state felony trials. *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). *Gideon* was expanded by *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972), in which the Supreme Court found that a defendant's sixth amendment right attaches as a matter of law in any criminal proceeding where a defendant may be imprisoned.

In *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S. Ct. 176, 36 L. Ed. 2d 656 (1973), the Court recognized a fourteenth amendment due process right to counsel, but refused to extend to civil proceedings the "*per se* rule" it had enunciated in *Gideon* and *Argersinger*. *See also, e.g., Vitek v. Jones*, 445 U.S. 480, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980); *In re Gault*, 387 U.S. 1, 87 S. Ct. 428, 18 L. Ed. 2d 527 (1967). Instead, the Court allowed a case-by-case due process approach dependent upon the facts of the case and type of proceeding. The Court reiterated this view in *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640, *reh'g denied*, 453 U.S. 927, 102 S. Ct. 889, 69 L. Ed. 2d 1023 (1981).

In *Lassiter*, the Court announced that when there is the possibility of incarceration, the right to appointed counsel is a presumption:

> "[T]he Court's precedents speak with one voice about what 'fundamental fairness' has meant when the Court has considered the right to appointed counsel, and we thus draw from them the presumption that an indigent litigant has a right to appointed counsel only when, if he

> loses, he may be deprived of his physical liberty. It is against this presumption that all the other elements in the due process decision must be measured."

Lassiter, 452 U.S. at 26-27, 101 S. Ct. at 2159-60, 68 L. Ed. 2d at 649.

The "elements in the due process decision" to which *Lassiter* refers, and which must be evaluated to determine whether a right to an appointed attorney exists, are the three due process factors contained in *Mathews v. Eldridge*:

> "[f]irst the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value if any, of additional or substitute procedural safeguards; and finally, the government interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requisites would entail."

Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18, 33 (1976).

Thus, while the United States Supreme Court has not addressed the specific question this case raises, in *Lassiter* it has provided a clear method of decision -- apply the *Eldridge* factors and presume a right to counsel when there is the possibility of incarceration. The rule was not followed by the New Hampshire Courts.

II. The Decision Below Conflicts with Decisions of Several Federal Circuit Courts of Appeals and Reveals a Split in the Circuits

Cases with facts substantially identical to Mr. Friedline's have reached six circuit courts of appeals. In five of them, the courts held that when incarceration is a possible result of a child support civil contempt, the contemnor has a right to appointed counsel. In *Walker v. McLain*, 768 F.2d 1181 (10th Cir. 1985), *cert. denied*, 474 U.S. 1061, 106 S. Ct. 805, 88 L. Ed. 2d 781 (1986), the tenth circuit cited *Lassiter* and held that in a child support civil contempt case,

> "It would be absurd to distinguish criminal and civil incarceration; from the perspective of the person incarcerated, the jail is just as bleak no matter which label is used. In addition, the line between criminal and civil contempt is a fine one, and is rarely as clear as the state would have us believe. The right to counsel, as an aspect of due process, turns not on whether a proceeding may be characterized as 'criminal' or 'civil,' but on whether the proceeding may result in a deprivation of liberty."

Walker v. McLain, 768 F.2d at 1183. The fourth, fifth, and sixth circuits, also citing *Lassiter*, have decided the question in favor of a right to counsel. *Leonard v. Hammond*, 804 F.2d 838 (4th Cir. 1986); *Ridgeway v. Baker*, 720 F.2d 1409 (5th Cir. 1983); *Seiver v. Turner*, 742 F.2d 262 (6th Cir. 1984). The ninth circuit, in a pre-*Lassiter* case, wrote that "absent the representation of counsel, [a child-support civil contemnor] could not be sentenced to jail in the contempt proceedings." *Henkel v. Bradshaw*, 483 F.2d 1386, 1388 (9th Cir. 1973). *See also Parker v. Turner*, 626 F.2d 1 (6th Cir. 1980).

While this case grows out of a state court decision, it

reveals a split in the circuits. The first circuit called the presumption in *Lassiter* "dicta" and denied a right to counsel. *Wilson v. New Hampshire*, 18 F.3d 40, 41 (1st Cir. 1994).

III. The Decision Below Conflicts with Decisions of Several State Courts and Reveals a Split Among the States

Cases with facts substantially identical to Mr. Friedline's have reached numerous state courts. The courts have generally held that when incarceration is a possible result of a child support civil contempt hearing, the contemnor has a right to appointed counsel. In most of the post-*Lassiter* cases, *Lassiter* is cited as creating a presumption to a right of counsel. *Otton v. Zaborac*, 525 P.2d 537 (Alaska 1974); *Dube v. Lopes*, 40 Conn. Supp. 111, 481 A.2d 1293, 1294 (1984) ("It is crystal clear that a person may not be incarcerated by the state without first being advised of his constitutional right to counsel, and, if indigent, without having counsel appointed to represent him."); *Padilla v. Padilla*, 645 P.2d 1327 (Colo. Ct. App. 1982); *County of Santa Clara v. Santa Clara County Super. Ct.*, 2 Cal. App. 4th 1686, 5 Cal. Rptr. 2d 7 (1992); *In re Marriage of Stariha*, 509 N.E.2d 1117 (Ind. Ct. App. 1987); *McNabb v. Osmundson*, 315 N.W.2d 9 (Iowa 1982); *Johnson v. Johnson*, 11 Kan. App. 2d 317, 721 P.2d 290 (1986);*Cox v. Slama*, 355 N.W.2d 401 (Minn. 1984); *State ex rel. Shaw v. Provaznik*, 708 S.W.2d 337 (Mo. Ct. App. 1986) (decided on state law grounds); *Darbonne v. Darbonne*, 85 Misc. 2d 267, 379 N.Y.S.2d 350 (Sup. Ct. 1976); *Rudd v. Rudd*, 45 A.D.2d 22, 356 N.Y.S.2d 136 (1974); *State ex rel. Gullickson v. Gruchalla*, 467 N.W.2d 451 (N.D. 1991); *In re Marriage of Gorger*, 82 Or. App. 417, 728 P.2d 104 (1986) (decided on state law grounds); *Commonwealth ex rel. Brown v. Hendrick*, 220 Pa. Super. 225, 283 A.2d 722 (1971); *Ex parte Gunther*, 758 S.W.2d 226 (Tex. 1988) (decided on state law grounds); *Tetro v. Tetro*, 86 Wash.

2d 252, 254-55, 544 P.2d 17, 19-20 (1975); *Brotzman v. Brotzman*, 91 Wis. 2d 335, 283 N.W.2d 600 (1979) (decided on state law grounds); *Smoot v. Dingess*, 160 W. Va. 558, 236 S.E.2d 468 (1977); *see also Carroll v. Moore*, 228 Neb. 561, 423 N.W.2d 757 (1988) (paternity case with no possibility of incarceration).

The Supreme Courts of Michigan and North Carolina explicitly overturned their previous pre-*Lassiter* decisions which had found no right to counsel. In both states, the courts cited *Lassiter* as creating a presumption of a right to counsel when physical liberty is at jeopardy, found a right to an attorney for the indigent at hand, and overturned the earlier decision. *Mead v. Batchlor*, 435 Mich. 480, 483, 460 N.W.2d 493, 494 (1990), *overruling Sword v. Sword*, 249 N.W.2d 88 (Mich. 1976); *McBride v. McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993), *overruling Jolly v. Wright*, 300 N.C. 83, 265 S.E.2d 135 (1980). In Maryland, the Court of Appeals cited *Lassiter* and overturned its earlier decision without mentioning it. *Rutherford v. Rutherford*, 296 Md. 347, 464 A.2d 228 (1983), *overruling Chase v. Chase*, 287 Md. 472, 413 A.2d 208 (1980).

The Florida Supreme Court handled the problem in a sensible fashion, eliminating the possibility of incarceration for unrepresented contemnors.

> "[W]e find that there are no circumstances in which a parent is entitled to court-appointed counsel in a civil contempt proceeding for failure to pay child support because if the parent has the ability to pay, there is no indigency, and if the parent is indigent, there is no threat of imprisonment."

Andrews v. Walton, 428 So. 2d 663, 666 (Fla. 1983);

These cases show that while there are a number of solutions to the problem, the result in Mr. Friedline's case is

inconsistent with numerous state court decisions.

In a few states, however, courts have reached the same conclusion as New Hampshire and have refused to find a right to counsel. *In re Marriage of Betts*, 200 Ill. App. 3d 26, 558 N.E.2d 404 (1990); *Meyer v. Meyer*, 414 A.2d 236 (Me. 1980); *New Mexico ex rel. Department of Human Servs. v. Rael*, 97 N.M. 640, 642 P.2d 1099 (1982); *In re Calhoun*, 47 Ohio St. 2d 15, 350 N.E.2d 665 (1976); *Ex parte Wilson*, 559 S.W.2d 698 (Tex. Civ. App. 1977).

Thus, Mr. Friedline's case also reveals a split among the states.

IV. Whether a Child Support Civil Contemnor has a Right to Counsel is an Important Question of Federal Law that Should be Settled by This Court

Whether a child support civil contemnor has a right to counsel is an important question of federal constitutional law that should be settled by this court.

During the last several years there have been prominent state efforts to collect child support payments from "deadbeat dads." *See e.g.*, Steven Waldman, *Deadbeat Dads*, NEWSWEEK, May 4, 1992, cover. However, states are beginning to neglect the practical and constitutional problems of some of those dads and moms. Michelle Hermann & Shannon Donahue, *Fathers Behind Bars: The Right to Counsel in Civil Contempt Proceedings*, 14 N.M. L. REV. 275 (1984). The national question of the process by which a child support obligor may be constitutionally incarcerated will unfortunately not go away. The question should be resolved by this court.

Moreover, the cases cited reveal that there is substantial disagreement on whether the presumption of a right to counsel in *Lassiter* is controlling precedent or whether it is merely dicta.

Kurt F. Hausler, *The Right to Appointment of Counsel for the Indigent Civil Contemnor Facing Incarceration for Failure to Pay Child Support*, 16 CAMPBELL L. REV. 127 (1994); Robert Monk, *The Indigent Defendant's Right to Court Appointed Counsel in Civil Contempt Proceedings for Nonpayment of Child Support*, 50 U. CHI. L. REV. 326 (1983); Edward G. Mascolo, *Procedural Due Process and the Right to Appointed Counsel in Civil Contempt Proceedings*, 5 W. NEW ENG. L. REV. 601 (1983); David L. Kern, *Due Process in the Civil Nonsupport Proceeding: The Right to Counsel and Alternatives to Incarceration*, 61 TEX. L. REV. 291 (1982).

Because *Lassiter* is open to disparate interpretations with drastically different results, this court should resolve the question.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully Submitted,

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